

June 4, 2020

The Honorable Alex M. Azar II  
U.S. Department of Health & Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

**Re: Drug Hair Testing Policies**

Dear Secretary Azar,

I write on behalf of the Sikh Coalition, the nation's largest Sikh American legal and civil rights organization, to share concerns about the impact that drug hair testing will have on the civil liberties of religious minorities, in particular Sikh-Americans. The Sikh Coalition understands that your Agency will soon publish a notice of public rulemaking to obtain input on this important topic. In advance of that notice, we seek to share information that would assist the Department of Health & Human Services (HHS) in crafting policies and rules that take into account the needs of *all* Americans, including Sikhs and other religious minorities.

Observant Sikhs maintain unshorn hair (*kesh*) as one of the primary means to practice their faith. This religious mandate includes not only hair on the head, but all body hair for men and women. The Sikh religious code of conduct explicitly forbids cutting, shaving, or removal of hair. Maintaining uncut hair is an essential part of the Sikh way of life; one cannot be a practicing Sikh without it. Denying a Sikh the right to maintain *kesh* has symbolized denying that person the right to belong to the Sikh faith, and is perceived by adherents as the most humiliating and hurtful physical injury that can be inflicted upon a Sikh. The religious mandate to maintain unshorn hair is not unique to Sikhs; other faiths which have a sacrosanct reverence for hair include Rastafarians, Apostolic Pentecostals, Native Americans, Nordic Hedons, and Amish.

HHS's forthcoming proposed rule on federal workplace drug testing will have far reaching and broad consequences for religious minorities like Sikhs. As you know, the Fixing America's Surface Transportation (FAST) Act<sup>1</sup> (passed in 2015) includes a mandate that HHS and the Department of Transportation (DOT) not only 1) promulgate regulations permitting the use of hair drug testing of commercial drivers license holders as an acceptable alternative to urine testing, but 2) provide religious accommodations to that hair testing. However, the threshold introduction of federal workplace hair testing standards by HHS may be adopted in more than 430 other federal departments, agencies, and sub-agencies. While the FAST Act specifically requires DOT to provide drug hair testing accommodations for religious observers, other agencies are not similarly bound to accommodate. Communities like ours would be left with the daunting burden of educating and

<sup>1</sup> See 49 US § 31306 (b)(1)(B)(ii) & (b)(2)(C).



informing each and every agency which adopts drug hair testing to provide religious accommodations in accordance with federal law. The absence of a unified policy on religious accommodations for hair testing would create a patchwork of inconsistent policies and procedures for employers and laboratories that would negatively impact religious minorities like Sikhs.

### **Discriminatory Harm Already Exists With Far Reaching Consequences**

Sikhs are already disproportionately subject to employment discrimination as a result of hair-testing requirements. For example, the Sikh Coalition represented three observant Sikh truck drivers who were wrongfully terminated from transportation logistics giant J.B. Hunt for refusing on religious grounds to submit hair samples for drug testing. The EEOC brokered a settlement between the parties in 2016, after a seven-year federal investigation during which it concluded that JB Hunt had discriminated against the Sikh truck drivers in violation of federal law by failing to provide religious accommodations.<sup>2</sup> During the course of the investigation, J.B. Hunt revised its written policies and procedures regarding discrimination and religious accommodations, and established an alternative to drug testing by hair sample for those who require religious accommodations.

Note that the challenges posed by hair testing are not limited to observant Sikhs in the federally regulated transportation industry. The Sikh Coalition has received requests from observant Sikhs in the medical, technology and pharmaceutical industries for help to advance their rights vis a vis workplace hair testing requirements.

Employers often fail to provide religious accommodations to hair testing requirements for several reasons:

- (1) Managers making hiring and related employment decisions simply do not know that Title VII of the Civil Rights Act of 1964 (and analogous state anti-discrimination laws) require them to provide accommodations in the workplace absent undue hardship when workplace requirements conflict with employee/applicants' religious beliefs.
- (2) Even when employers know of their obligations under federal & state anti-discrimination law, they fail to make accommodations because the standard under Title VII is very weak. As discussed in more detail below, federal law defines "undue hardship" as a "*de minimus* cost or burden" – minimal cost or burden. Thus, some employers insist that safety is paramount such that they must conduct hair sample testing (and not urinalysis), and that providing any alternatives is a logistical hassle. Some simply do not know that alternatives exist and/or fail to research alternatives.
- (3) Drug testing (particularly pre-employment) is often outsourced to third-party labs. Both of the aforementioned reasons are compounded when the third-party techs performing drug testing fail to realize that they are acting as agents of the employer, and are untrained to respond to requests for religious accommodation.

<sup>2</sup> Dan Weikel, *Sikh truck drivers reach accord in religious discrimination case involving a major shipping company*, Los Angeles Times, Nov. 15, 2016, at A1, available at <https://www.latimes.com/local/lanow/la-me-ln-sikh-truckers-20161115-story.html>.

The above is complicated further if the employee is limited English proficient (LEP), as is the case for a number of Punjabi-speaking Sikh immigrants. It is difficult enough for employees to understand their rights under employment discrimination law if their native language is English. For LEP individuals, articulating a religious accommodation request can be extremely challenging.

Employers may not only deny employment to qualified individuals who refuse drug hair testing on religious and medical grounds, but may place objecting individuals onto unregulated industry-specific databases that effectively prohibit the individual from obtaining jobs with other employers. Unfortunately, individuals wrongfully placed onto these databases may not even be aware that they have been blacklisted from employment. And even those who are provided notice may face difficulty clearing their names.

The DOT, for example, has already created its own database, the Drug & Alcohol Clearinghouse, to monitor drug testing failures of truck drivers. The database would prohibit individuals on this list from operating a commercial motor vehicle and directly create a financial hardship for those wrongfully added to the Clearinghouse. Removal from the Drug & Alcohol Clearinghouse is not instant and could take many days before a commercial driver is able to resume operations. While a Federal Motor Carrier Safety Administration-regulated appeals process exists, an individual who repeatedly requests medical or religious accommodation may find themselves repeatedly entered onto the Clearinghouse database causing significant financial disruption to the driver.

### **Federal Law Requires Accommodations for Hair Testing**

It is imperative that government agencies which promulgate hair testing schemes - whether towards their own employees, government contractors, or the industry-employers they regulate - include specific provisions mandating religious accommodation.

Mandating such accommodations ensures that neither the government nor industry-employers violate individuals' civil rights. The government, for example, is bound by the strict standards of the Religious Freedom Restoration Act (RFRA). RFRA mandates that the federal government "not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

A "substantial burden" exists under RFRA when government action places substantial pressure on an individual to change his behavior and violate his religious beliefs.<sup>3</sup> The inclusion of a mandatory hair testing policy in a federally regulated industry or program would certainly be a substantial burden on an observant Sikh subject to that policy. In this scenario, the government has a compelling

<sup>3</sup> See *Kaemmerling v. Lappin*, 553 F.3d 669, 677-78 (D.C. Cir. 2008); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

government interest to advance the safety and health issues of the industries it regulates. That being said, any mandatory hair testing may not be in *furtherance* of that compelling governmental interest and certainly would not be the *least restrictive means* of furthering that compelling governmental interest. This is because a number of alternatives exist to hair testing - such as urine testing and oral fluids testing (both of which HHS regulates) as well as possible other forms of testing (e.g., nail testing) - through which similar information about individuals' drug/alcohol use would be obtained.

Similarly, employers must abide by anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII) at the federal level. Title VII prohibits an employer from discriminating against an employee on the basis of religion when a workplace requirement conflicts with the employee's religious practices - unless the employer shows that it cannot reasonably accommodate the employee's religious needs without imposing an "undue hardship" on the employer's business.<sup>4</sup> The U.S. Supreme Court has determined that an accommodation causes "undue hardship" whenever it results in "more than a de minimus cost" to the employer - in other words, a minimal cost or burden.<sup>5</sup> Courts generally find that documented health and safety objections qualify as a "de minimus cost or burden" on an employer in the face of a request for religious accommodation - particularly where the employer provides evidence that the proposed accommodation would either cause or increase safety risks or the risk of legal liability for the employer.<sup>6</sup> That being said, an employer's health and safety objections to an employee's accommodation request to mandatory hair testing would be obviated given the number of alternative forms of drug testing available (e.g., urine, oral fluids and nail) through which the same or similar information about individuals' drug/alcohol use may be gleaned.

While observant Sikhs (and others of minority faiths) require accommodations to hair testing for religious reasons, other individuals may require accommodations for medical reasons (consistent with the Americans with Disabilities Act and other statutory protections). Therefore, it is in employers' and/or the governments' interest to provide comprehensive and consistent accommodation policies. In addition, it is imperative that these accommodations provide no greater burden on the individuals seeking them. For example, people seeking accommodations (for whatever reason) should not be subject to a greater number of urine tests as an alternative to hair testing. These types of additional burdens may indeed also violate RFRA and Title VII.

### **Recommendations to Mitigate Against Discrimination**

As such the Sikh Coalition recommends that the Agency implement rules that ensure drug hair testing standards do not create a disparate impact for religious communities through a hodgepodge of testing

<sup>4</sup> *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 63 (1986) (citing 42 U.S.C. §2000e(j)).

<sup>5</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63,74, n. 9; *Philbrook*, 479 U.S. at 67.

<sup>6</sup> See, e.g., *Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1383 – 84 (9th Cir. 1984) (accommodating employee's religious mandate to maintain unshorn beard that interfered with breathing apparatus needed for safety would create risk of violating occupational safety laws); *Kalsi v. New York City Transit Authority*, 62 F.Supp.2d 745, 759 – 60 (E.D.N.Y.1998) (accommodating employee's refusal to wear hard hat would increase risk of injury and liability), *aff'd mem.*, 189 F.3d 461 (2d Cir.1999).

standards that can vary among 430+ federal agencies and departments. To reduce the occurrence of discriminatory drug testing by employers and laboratories we recommend that the Agency adopt the following policies to ensure compliance with federal law and constitutional protections on the exercise of religion.

We request that the Agency consider adopting drug hair testing accommodation policies in advance of the rulemaking process to ensure that the religious rights of all Americans are not infringed upon. The promulgation of drug hair testing for federal workplace drug testing will lead to a standardization of not only scientific testing, but also policies on administering such testing. A centralized approach on drug hair testing to accommodate religious and medical needs will ensure that all entities relying on drug hair testing are compliant with federal law and reduce inconsistencies in testing procedures and policies for federal agencies, state and local government, along with private industry.

#### Clear Guidance and Training Required

To mitigate against the burdens that drug hair testing may pose to religious minorities, we strongly urge that the agency put in place measures that inform laboratories, employers, and agencies of the need to accommodate religious drug testing needs. This should include providing laboratories with procedures and policies for alternative testing methods, and ensuring that the Drug Testing Advisor Board (DTAB) issues regular notices to all certified laboratories on guidelines for religious and medical accommodations on hair testing.

Furthermore, information regarding legal obligations to accommodate medical and religious accommodations must be communicated and understood by laboratories and employers using hair drug testing. Mandating training on accommodation policies and legal obligations can reduce the risk of disparate impact on religious minorities.

#### Safeguard Against Wrongful Database Entries

The wrongful addition of drug hair testing refusals on the basis of religion in employment or licensing databases creates significant obstacles to gainful employment. To mitigate against a disparate impact on minority religious communities, the Agency must ensure that safeguards exist. Furthermore, the unregulated nature of private databases can have unknown and far reaching consequences on minority religious groups. As such, it is critical that the Agency put in place appropriate privacy safeguards that prohibit the disclosure of drug hair testing refusals on religious and medical grounds to any employer or third party. Strong privacy measures are necessitated by the lack of transparency and removal procedures in private drug hair testing databases.

#### Certify Testing Facilities for Accommodations

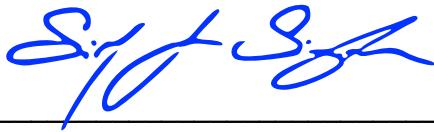
Laboratories used for federal workplace testing must already undergo certification for federal use. The National Laboratory Certification Program (NLCP) can ensure religious and medical accommodations are appropriately provided in hair testing at all federally certified laboratories.

Certification requirements can ensure that facilities provide religious and medical accommodations guidance in a laboratory's standard operating procedures.

## **Conclusion**

The Sikh Coalition looks forward to participating in the notice of public rule making and sharing our concerns with the HHS on issues related to religious accommodations on drug hair testing. It is imperative that the Agency provide clear guidance to laboratories and employers on hair drug testing accommodations for religious or medical needs. These protected classes of individuals will also need adequate safeguards to ensure they will not be blacklisted from employment by the wrongful entry onto drug testing databases.

Sincerely,



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**Sim J. Singh**  
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The Sikh Coalition

cc: Chairwoman Janet Dhillon, Equal Employment Opportunity Commission  
Director Russell Vought, Office of Management and Budget